Supreme Court, U. S.
FILED
MAR 14 1977
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

October Term, 1976

No. 76–689

WILLIAM CHADBOURNE MITCHELL,

Petitioner,

–against–

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY MEMORANDUM

ERIC M. LIEBERMAN
MICHAEL B. STANDARD
Rabinowitz, Boudin and Standard
30 East 42nd Street
New York, New York 10017

Attorneys for Petitioner

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The government argues that the search and seizure in this case should be upheld on the theory that a warrant is never required for a search of a vehicle, at least unless the vehicle is parked on private property (Brief in Opposition at 5-6). The Court, of course, never has sanctioned such an obliteration of the Fourth Amendment warrant requirement, and it has indicated repeatedly that the law requires a warrant unless exigent circumstances make it impractical to obtain one. See *Carroll* v. *United States,* 267 U.S. 132; *Coolidge* v. *New Hampshire,* 403 U.S. 443; *Chambers* v. *Maroney,* 399 U.S. 42, 50-51; *Cf., Almeida Sanchez* v. *United States,* 413 U.S. 266, 280-282 (Powell, *J.,* concurring). Indeed, in *Cardwell* v. *Lewis,* 417 U.S. 583, the Court declined to follow the suggestion of the Solicitor General to adopt the very theory propounded by the government here (See Brief for the United States as Amicus Curiae).

Thus the search and seizure in the present case cannot be upheld upon the government's novel "no warrant" theory, at least without full argument and plenary review. Rather than forthrightly conceding this point and asking that the petition be

granted, however, the government urges two alternative courses: (1) that the Court "hold the case pending its disposition of [United States v.] *Chadwick,*" No. 75-1721, certiorari granted, October 4, 1976, a case which the government claims will determine the validity of the theory it raises: or (2) that the Court deny certiorari on the "exigent circumstances" rationale. Neither suggestion is well-taken.

1. The *Chadwick* case hardly presents the question whether a vehicle may be seized or searched upon probable cause but without exigent circumstances. In *Chadwick,* the federal agents seized a footlocker upon probable cause and *with* exigent circumstances. The court of appeals upheld the *seizure* of the locker because of the exigency factor, but it rejected the government's argument that *Chambers* v. *Maroney, supra,* sanctioned the subsequent *search* of the footlocker once it was in the possession of the federal agents. The question before this Court in *Chadwick* is whether the court of appeals was correct in declin- to extend *Chambers* from the automobile to the footlocker situation.[1] It would be neither necessary nor appropriate for the Court in *Chadwick* to reach or decide the question whether the warrant requirement should be dispensed with entirely for non-exigent seizures or searches of parked vehicles.

The theory raised by the government requires the plenary consideration of the Court in a case involving the non-exigent seizure of a vehicle. This is the paradigm of such case (See Petition, *passim*). The government's effort to raise the issue in previous cases and once again in this case dramatically demonstrates the importance of the question and the need for its early resolution. Certiorari should be granted to resolve it together with the

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1. The "Question Presented" on the government's petition and brief is:

> Whether a search warrant is required before federal agents may open a locked footlocker *that is properly in their possession* and that they have probable cause to believe contains contraband.

Petition at 2, Brief at 1-2 (emphasis added).

several recurring and important questions posed by petitioner.[2]

2. The government argues that "the facts of this case bring it well within the established perimeters of the 'automobile search' exception to the warrant requirement" (Brief in Opposition at 6), apparently relying on the exigent circumstances rationale. Yet the government utterly fails to respond to petitioner's argument (Pet. 7-12) that there can be no exigent circumstances where the federal agents planned well in advance to seize the vehicle on a particular day, at a particular place, and under well-anticipated conditions, and where the entire law enforcement operation proceeded exactly as planned. Significantly, the government does not attempt to rely upon the logically inconsistent opinion of the court of appeals majority. Even more significantly, the government does not point to a single circumstance which made it necessary – or reasonable – for the federal agents to plan such a seizure but consciously to decide not to obtain a warrant.

Indeed, the government's response is to ignore the fact that this was a planned warrantless search. Only by refusing to acknowledge the critical fact that the federal agents knew the precise circumstances under which they would initiate the seizure and search is the government able to claim reliance upon *Husty* v. *United States,* 282 U.S. 694, and upon the *dictum* from Mr. Justice Blackmun's *Cardwell* opinion which appears at 417 U.S. at 595-596. But as we have seen (Petition at 9-10), Mr. Justice Blackmun's *dictum* does not purport to sanction a warrantless search or seizure in which the law enforcement agents, having probable cause, decide far in advance when and where to act. *Husty* is inapposite for similar reasons: the *Husty* court quite plainly and explicitly relied upon the suddenness, uncertainty and exigency of the situation facing the federal officers

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2. If the Court is of the view that its decision in *Chadwick* might control the present case, the petition should be granted and the cases should be set for argument together. This would enable the Court to consider the government's theory in the context of a non-exigent vehicular search, as well as in the exigent, non-vehicular context of *Chadwick.*

which made it impractical for them to obtain a warrant. 282 U.S. at 701. Here, there was neither suddenness, uncertainty, nor exigency, and the failure to obtain a warrant cannot be justified.[3]

Finally, the government is incorrect in dismissing the vehicular search opinions rendered by other courts of appeals as demonstrating merely an "uncertain[ty] about the precise outer perimeter of the automobile search doctrine" (Brief in Opposition at 9). In the first place, the decisions reflect no uncertainty with respect to a search or seizure such as occurred here; all of the courts expressed disapproval of such an action. Second, the issue presented here is not peripheral; if the search in this case is upheld it will effect a major diminution of the warrant requirement and a novel (and illogical) expansion of the exigent circumstances rationale. Finally, reconciliation of the divergent views and opinions in the automobile search area has been called for by several courts of appeals (See Petition at 12, 14). Contrary to the government's view, it is particularly the facts of this case – in which the federal agents intentionally, purposely, and needlessly decided to forego the warrant procedure – which demonstrate why a resolution by this Court is needed.

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3. Compare *United States* v. *Coplon*, 185 F.2d 629 (2d Cir. 1950), *cert. denied*, 342 U.S. 920, in which the court, in an opinion by Chief Judge Learned Hand, reversed the defendant's conviction in part because the federal agents had engaged in a planned warrantless arrest and subsequent search, in violation of federal statute. The relevant facts in *Coplon* were remarkably similar to those present here:

> It is apparent that even in the morning the Bureau had decided to arrest her that day; and there was not the least need of doing so without a warrant. No sudden emergency forced the hand of the agents; they made everything ready except the one condition which would have made the arrest lawful: a warrant.

185 F.2d at 635.

Here, too, no sudden unanticipated emergency forced the hands of the agents. As Judge Dyer stated in dissenting from the court of appeals *en banc* decision:

> From beginning to end the truck's trip varied not one iota from the detail worked out in rehearsal – about which all was known by the agents. Even the closed circuit television cameras were in place to photograph and record the arrest and seizure. The agents knew that someone (Mitchell) would get into the truck at the Holiday Inn and attempt to drive away. At the time of the seizure nothing had occurred or did occur that was unanticipated or unexpected. It is semantic aphasia to define these circumstances as exigent.

Petition at 12a.

The only difference between *Coplon* and the present case is that in *Coplon* the warrantless arrest violated federal statute, while here the warrantless search and seizure violated the Fourth Amendment.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

ERIC M. LIEBERMAN
MICHAEL B. STANDARD
Rabinowitz, Boudin & Standard
30 East 42nd Street
New York, New York 10017

Attorneys for Petitioner

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